INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 578

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 42–47) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 4, 1943 (R. 47). The petition for a writ of certiorari was filed January 4, 1944, and granted March 6, 1944. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the court below properly held that under the Freight Land-Grant Equalization

Agreement between the United States and petitioner, the Government was entitled, in computing the charges to be paid for the transportation of its property over petitioner's lines, to use the lowest net rates which the Government would have had to pay for the transportation of such property over land-grant routes between origin and destination, even though such routes were more circuitous than the actual routes used by petitioner for the transportation.

INTRODUCTION

To aid in the construction of railroads in the United States, Congress since 1850 has granted land for right-of-way to many railroads upon condition that they furnish transportation to the Government free of charge or at reduced rates (R. 74A; *Southern Pacific Co.* v *United States*, 307 U. S. 393, n. 1). Such railroads are known as "land-grant" lines; and since 1924 all such roads have been required to allow the Government, for transportation of Federal troops or property, deductions of 50% of the commercial rate, multiplied by the percentage of the route between the points of origin and destination which passes over granted land. Act of June 7, 1924 (43 Stat. 477, 486; 10 U. S. C. § 1375).[1] By section 321 of the

[1] A typical example illustrating the computation of a net land-grant rate for the movement of Government property over a land-aided route would be as follows: A shipment of first-class freight moves from Chicago, Ill., to Kansas City, Mo. The commercial rate is 80 cents per cwt. and the net

Transportation Act of 1940 (54 Stat. 898, 954) the 50% reduction was made applicable only to the movement of military or naval personnel and property.

Not all railroads, however, have received land grants.[2] Since it is the policy of the Government, often expressed in administrative regulations, to move Federal troops and property at the lowest available rates, it declines to use higher cost non-land-grant routes wherever reduced rates over land-grant routes are available. As a consequence of this policy non-land-grant roads were unable to obtain Government business wherever land-grant routes were available to the Government. In order to secure such business, numerous non-land-grant railroads entered into contracts with the United States whereby they agreed to accept Government shipments over their lines at the same rates as would be applicable to the shipments over land-grant routes. 22 Comp. Dec. 129, 130. These contracts are known as "land-grant equalization agreements," and the roads which are parties to such agreements are called

rate is established over the "A" R. R. from Chicago to Kansas City. The total distance is 500 miles, of which 150 miles (or 30%) is over a land-grant line. The deduction from the commercial rate would therefore be 50% x 30%, or 15%. The net rate, therefore, would be 80 cents minus 15% thereof, or 68 cents.

[2] The value of all of the Federal and State land grants has been variously estimated from $174,000,000 to $2,480,000,000. II *Public Aids to Transportation* (Office of Federal Coordinator of Transportation, 1938), p. 33.

"equalizing" lines. And since the amount of a land-grant reduction varies with the percentage of land-grant comprised within the route (see n. 1 *supra*), roads having only part of their lines over granted lands have in many instances also entered into equalization agreements for the purpose of meeting the reductions available over lines serving the same points but having greater amounts of land-grant and hence lower net rates. *Public Aids to Transportation, supra,* n. 2, at p. 42; 22 Comp. Dec. 129, 130.

Today practically all railroads, both land-grant and otherwise, are parties to rate-equalization agreements covering the movement of Government troops and property.[3]

STATEMENT

The facts in this case were stipulated (R. 55–74), and are as follows:

Petitioner, Southern Railway Company, a railroad whose route includes 145 miles of land-grant, is engaged in transporting freight and passengers in interstate and intrastate commerce (R. 1, 55). On November 29, 1933, petitioner entered into a "Freight-Land-Grant Equalization Agreement" with the United States under the authority of Section 22 of the Interstate Commerce Act (24 Stat.

[3] See *Freight Land-Grant Equalization Agreement together with List of Agreement Carriers*, Circular No. 3–B, March 1, 1941, War Department, Office of Quartermaster General, Washington.

387, 49 U. S. C. § 22). Petitioner agreed, with certain exceptions not here pertinent (R. 55–56),

> to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled, to reduced rates over land-grant roads, *the lowest net rates lawfully available,* as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement. [Italics added.]

Between 1934 and 1938, while this agreement was in effect, authorized agents of the United States made 374 shipments of Government-owned property over petitioner's lines and its connections.[4] As to each shipment, there was available for use by the general public and the Government three or more different routes between point of origin and destination: Petitioner's non-land-grant route, generally the shortest; and two or more longer routes over other roads, containing land grants of varying percentages. The pertinent tariffs for freight shipments between these

[4] These consisted of 147 shipments of livestock by the Federal Surplus Relief Corporation in 1934 from midwest points to southeastern points (R. 56); and 227 shipments of various kinds of Government property by the Tennessee Valley Authority between 1934 and 1938, from and to south-central and southeastern points (R. 61).

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points, to which petitioner and other carriers serving such points were parties, were on file with the Interstate Commerce Commission; and the rates shown by these tariffs for a commercial shipment between two given points were identical for each of the alternative routes here in question, regardless of mileage (R. 57–58, 62–65, 67, 69, 71).

The bulk of the shipments here involved passed over petitioner's non-land-grant lines.[5] Recognizing that its Equalization Agreement required certain land-grant deductions to be made from the tariff rate for these shipments, petitioner allowed the United States the rate reductions to which the Government would have been entitled had it actually made the shipments via one of the available land-grant routes between origin and destination. The route which petitioner selected for this purpose was somewhat longer than the route which it actually used for the shipments and contained some land-grant mileage (R. 57–72). However, the Government claimed the deductions to which it would have been entitled had it used a still longer available alternative route between these points, comprising greater land-grant mileage.[6] Since the commercial tariff rates over either avail-

[5] To the minor extent that the shipments passed over land-grant connecting lines, the proper land-grant deductions were allowed to the Government by petitioner. There is no question here as to these deductions.

[6] On most of the 147 shipments of the Federal Surplus Relief Corporation (excepting merely certain shipments which originated at East St. Louis, Ill.), the route selected

able route was the same,[7] the greater land-grants included in the route selected by the Government resulted in lower rates than those allowed under the route selected by petitioner.

The Government paid the lower rates (totalling $86,052.47), and petitioner thereupon brought suit in the Court of Claims for the difference between the amount paid and the rates calculated by the route which it had selected (the alleged balance being $10,555.36 (R. 36, 57, 61)). The United States counterclaimed for an alleged overpayment of $1,251.73 according to its calculations (R. 42, 46).[8] The Court of Claims denied recovery to petitioner and entered judgment on the counterclaim for the Government (R. 47). The court held that the "unambiguous language of the Equalization Agreement" required petitioner "without qualification or exception to accept for the transporta-

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by petitioner and the Government for purposes of equalization were identical to Cairo, Ill.; from Cairo to destination the routes diverged, the Government's route being somewhat longer and containing more land-grant mileage than the route selected by petitioner. Consequently, the controversy as to these shipments centers about the equalization route selected south of Cairo to destination (R. 57).

[7] Except as to four shipments, for which the rates over the route selected by the United States for equalization were 10% higher than the regular rate. In computing its charges, the United States duly increased the base rate 10% before making the land-grant deductions (R. 65–66, 69–71).

[8] This consisted of an alleged overpayment on certain shipments of $1,638.56, and alleged underpayments on others of $386.83, or a net overpayment of $1,251.73 (R. 46, 60, 72, 74).

tion of Government property the lowest net rates available over land-aided routes" (R. 43).

SUMMARY OF ARGUMENT

I

The terms of the Equalization Agreement are plain and unqualified. It explicitly requires petitioner to accept, for the transportation of property which could be shipped at reduced rates over land-grant roads, "the lowest net rates lawfully available" to the Government. It is undisputed that the shipments here in question could lawfully have moved over the land-grant route selected by the Government in computing the charges due to petitioner, and that if such a route had been followed, the rates approved by the court below would have been the proper transportation charge. Since petitioner has contracted to equalize its rates to "the lowest net rates lawfully available" to the Government, it was required under the unequivocal provisions of the Agreement to accept the rates which would have been chargeable to the Government if the shipments had moved over the longer land-grant route.

II

The purpose of the Equalization Agreement is twofold: (1) to enable non-land-grant roads to complete with land-grant roads for Government business; and (2) to enable the Government to

make shipments at the lowest rates available to it as a result of its land-grant policy. To read into the Agreement a proviso not contained within it, *viz*, that the land-grant routes must not only be available to the Government but must also be "routes over which the Government traffic might normally move in the absence of the agreement" (Pet. 3), would nullify the purpose and objectives of the Agreement. Whether an available land-grant route is competitive, in the ordinary commercial sense, with the non-land-grant route actually followed is of no significance. For if the rates are the same, the Government will usually prefer the shorter route; whereas if the rates vary, the Government will usually prefer the cheaper route. Historically, shipment of Government property has always been at the most economical rate available, even if great circuity of routings was required. An agreement intended to permit diversion of Government traffic to non-land-grant routes should not be construed to require the Government to pay higher rates than if it had not entered into the agreement.

Where economical transportation is a controlling desideratum, circuity of routes is not objectionable to commercial shippers. This factor has been utilized by carriers to obtain tariff rates for circuitous routes which are sufficiently low to enable them to compete for traffic which would otherwise move on shorter routes. Thus,

the commercial rate applicable to the shipments here involved was the same, regardless whether they moved over the longer and more circuitous route selected by the Government for purposes of computation or over the more direct route actually used by petitioner. That the longer route may not have been as desirable for certain shipments as the shorter route is of no consequence, since it is undisputed that all shipments here involved could lawfully have moved over the longer route at the rates which the Government sought to pay petitioner.

To construe the Agreement, as petitioner does, to mean that a land-grant route selected for computation must be one which competes with the actual route and which is reasonably likely to have been used in lieu of the shorter route, would, as the court below held (R. 46), "unavoidably result in uncertainty, confusion, and constant controversy". To determine the relative practicability and desirability of all available routes might require factual research into hundreds, or even thousands of different routes for every shipment to determine whether under the particular circumstances that shipment would move as satisfactorily under a more economical route as under the route of an equalizing carrier. The impracticability of making such an inquiry before each shipment would inevitably lead Government officers to avoid controversy by actually shipping over the circuitous low rate land-grant

route, thus defeating the very purpose for which petitioner and other non-land-grant roads entered into equalization agreements. Circuity of routing was well known to the parties when the Agreement was made; and the courts should not read into the contract an undesirable and impractical provision which the parties themselves failed to include.

ARGUMENT

I

THE PLAIN TERMS OF THE EQUALIZATION AGREEMENT SUPPORT THE CONSTRUCTION OF THE COURT BELOW

Under the Equalization Agreement, the rate chargeable by petitioner for "the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads," is to be—

> the lowest net rates lawfully available, as derived through deductions account of land grant-distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement (R. 55–56).

The rates applicable to the routes selected by the Government for equalization purposes clearly comply with these criteria.

It has been stipulated that the property involved in the 374 shipments in this case was shipped for account of the Government of the

United States; and that in respect of such shipments the Government is lawfully entitled to reduced rates over land-grant roads (R. 58, 59, 71–72), and petitioner in fact offered to allow the Government the reduced rates chargeable over the land-grant routes which petitioner selected (R. 29, 57, 71–72).

The "lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement" were set forth in tariffs to which petitioner as well as the land-grant carriers serving the points in question were parties (R. 57–58, 62–65, 67, 69, 71). With the single exception already noted (see n. 7 *supra*), none of these tariffs imposed any distance limitation upon the application of the commercial rates published therein, and the rates listed therein for commercial shipments between two given points were the same whether the shipment moved over petitioner's lines (the actual route of the shipments here in question), the somewhat longer land-grant routes selected by petitioner for equalization purposes, the still longer land-grant routes selected by the Government for the same purposes, or any other "routes made by the use of the lines of any of the carriers parties to this tariff" (R. 57–58, 59–60, 62–65, 66–69, 71–72).

From these "lawful rates" concededly applicable to the land-grant route selected by the Government for equalization, the Government

made "deductions account of land-grant distance" (R. 59–65, 71–72). These consisted of the statutory 50% deduction multiplied by the percentage of land-grant mileage between the points in question.[9] Since the net rates resulting from this computation would concededly apply to the shipments in suit had they actually been transported via the land-grant routes selected by the Government for equalization purposes, such rates would seem to fall clearly within the category of "the lowest net rates lawfully available," chargeable to the Government under the Agreement.

Petitioner seeks to avoid this obvious construction of the Equalization Agreement by arguing that the term "available" is ambiguous, and can mean "capable of being used to accomplish the purpose of the contract"; that since the purpose of the Agreement is to secure competitive traffic, the term should be construed to refer to land-grant rates "available" over *competitive* routes; consequently, that "the lowest net rates lawfully *available*" do not include rates over land-grant routes which are so circuitous as not to be competitive with the route actually used (Pet. Br. 24, 30, 38–44). This contention not only rejects the ordinary and accepted meaning of the term "available" in favor of interpretations given to it in totally dissimilar contexts, but ignores the basic purpose and objectives of the Agreement.

[9] See n. 1, p. 2, *supra*.

Government rates over land-aided roads are always predicated on commercial rates, from which deductions follow by operation of law in return for benefits conferred. *Louisville & Nashville R. R. Co.* v. *United States,* 57 C. Cls. 268, 277; *Same,* 58 C. Cls, 622, 631. Consequently, a net land-grant rate is "lawfully available" to the United States whenever it represents the result of land-grant deductions from the rate published in a tariff open to the public for application to shipments over that route. *Southern Pacific Co.* v. *United States,* 60 C. Cls. 662, 671. This simple reading of the term "available" finds support even in decisions construing it in different circumstances. As the authorities cited by petitioner itself show, "the ordinary meaning of 'available' is 'usable, capable or being used to advantage.'" See *Hamilton* v. *Menominee Falls Quarry Co.,* 106 Wis. 352, 81 N. W. 876, 878; Bouvier's Law Dictionary (Rawles, 3rd rev.); Webster's New International Dictionary (2d ed., unabridged, 1936).

That the usual meaning of "available" was the one intended by the parties to the Agreement is indicated by its background of decisions, judicial and administrative, rendered before the Agreement was executed. In 1923, when petitioner was a party to a freight equalization undertaking identical with that at bar, the Court of Claims held that an equalization agreement such as is here involved "provides for deductions from the

lawful established rate based upon the route having the *longest mileage of land grant"* (italics supplied). *Gulf & Ship Island R. R. Co.* v. *United States,* 58 C. Cls. 41, 49.[10] Likewise, in

[10] Petitioner cites *Louisville & Nashville R. R. Co.* v. *United States*, 61 C. Cls. 1 (1925), and *Northern Pacific R. R. Co.* v. *United States*, 72 C. Cls. 563 (1931), to support its contention that circuitous land-grand routes may not be used for equalization (Pet. Br. 11, 13, 24, 33). Neither supports this view. The *Louisville* case involved an equalization agreement which was similar to that here involved, entered into by several carriers, but an exception applicable to the Seaboard Air Line Railway called for equalization of "the net cash rates established via the longest land-grant mileage from point of origin to destination *over usually traveled routes* in connection with published tariff rates legally filed with the Interstate Commerce Commission." [Italics added.] The court found the record unsatisfactory as to whether the exception was applicable to the shipments for which plaintiff sued. It held that the land-grant deductions made by the Government were improper because, if the exception applied, the land-grant route used by the Government for equalization purposes was not a "usually traveled route;" and if the exception did not apply, there was "no showing that the deductions made * * * were from a lawful rate filed with the I. C. C. applying from point of origin to destination, and applicable as against" plaintiff or Seaboard (61 C. Cls. at 10–11). Its remarks concerning the "roundabout character and increased mileage" of the route used for equalization (p. 10) were purely dictum, obviously grounded upon the absence of a lawful filed tariff for that route. Indeed, the court disavowed any intention "to hold anything with reference to the use of the route in question as an equalizing route to the extent of establishing a controlling precedent. We determine only this case."

Northern Pacific R. R. v. *United States*, 72 C. Cls. 563, 575, merely involved the question of whether certain shipments were covered by the equalization agreement, and the court's passing remark as to "comparison with competing routes"

1913 when petitioner was a party to a freight equalization obligation identical with that here involved, the Comptroller of the Treasury ruled that such an undertaking requires the carriers "to accept for the transportation rendered the Government the same net rates as would apply over the route of longest land grant." 20 Comp. Dec. 167, 169; cf. 22 Comp. Dec. 129 (1915); 18 Comp. Gen. 81, 83 (1938).[11] Thereafter, peti-

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(p. 575) was purely *obiter*. *Gulf & Ship Island R. R. Co.* v. *United States*, 58 C. Cls. 41, 49, is the only holding in point in the Court of Claims, besides the decision below; and both are in accord with our view.

[11] Petitioner places considerable reliance (Pet. 34–36) upon the Comptroller General's decision of March 7, 1939 (18 Comp. Gen. 691, 694), which postdated the agreement and shipments here in suit. There the Comptroller General approved a maximum scale of distances proposed by the Treasury Department as an administrative guide to the extent of circuity routing under equalization agreements. The circuity percentages, graduated according to distances, ranged from 170% to 200%. However, the Comptroller General expressly disavowed any intention to preclude utilization of equalization routes exceeding these limitations, saying "it would not appear that any invariable rule should be adopted *as an accounting procedure* which by reason of its arbitrary application might operate to deprive the Government of benefits in some instances otherwise available and reasonably consistent with the purpose of the equalization agreement" (pp. 697–698, italics supplied). The schedule was thus approved merely as a guide to discretionary administrative application, subject to being superseded wherever the agreement afforded greater rights. In any event, this ruling postdated the contract and shipments here in question; any administrative construction by which the parties are to be bound must precede the transaction. Cf. *Southern Pacific Co.* v. *United States*, 307 U. S. 393, 401.

tioner renewed its agreement without qualification in the aspect here involved. See Manual for Quartermaster Corps (U. S. Army, 1916), Vol. 2, App. pp. 226, 230. Such renewal in the light of this administrative interpretation is highly significant in construing the contract; and in view of the objective of the Agreement—to secure on nonaided roads the land-grant savings to which the Government is entitled if it uses land-grant roads—any doubt must be resolved in favor of the Government. Cf. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 400–401.

That petitioner was not unaware of the meaning and implications of the language employed without qualification in its "Freight Land-Grant Equalization Agreement" may be inferred from the express qualification which it imposed upon a similar undertaking in its "Passenger Land-Grant Equalization Agreement" with the United States, which had been executed on January 1, 1917. The 1917 agreement provided:

> For the transportation of persons for whom the United States Government is lawfully entitled to reduced fares over land-grant roads, [petitioner and other carriers] * * * agree * * * to accept lowest net fare * * * lawfully available, as derived, through deductions account land-grant distance *via a usually traveled route* for military traffic, from a lawful fare filed with the Interstate Commerce Commission as applying from point

of origin to destination via such route at time of movement."[12]

Petitioner could readily have undertaken to include a similar qualifying provision in the section of its Freight Equalization Agreement dealing with exceptions (R. 14–16), had it desired to impose any qualification upon the land-grant routes which the Government was entitled to select for equalization purposes. In the circumstances, the failure to include the qualification which petitioner now seeks to engraft upon its agreement cannot be deemed an oversight, and should be taken to express the parties' intention. Cf. *Maryland* v. *Railroad Co.*, 22 Wall. 105, 112.

II

THE OBJECTIVES AND POLICY OF THE EQUALIZATION AGREEMENT REQUIRE THAT IT BE CONSTRUED TO PERMIT USE OF THE LOWEST POSSIBLE LAND-GRANT RATE

Petitioner argues that the purpose of an equalizing agreement was to secure for it "traffic which, in the absence of the agreement, would be *likely* to move over *competing land-grant routes*, as distinguished from traffic which is 'possible' of routing via the cheapest land-grant route"; that the routes used by the United States were noncom-

[12] See Manual for Quartermaster Corps, *supra*, at p. 223. Petitioner is at present a party to a substantially similar Passenger Equalization Agreement (Joint Military Passenger Equalization Agreement No. 20, July 1, 1943–June 30, 1944).

petitive with petitioner's route; and hence the Agreement did not require petitioner to equalize rates over such noncompetitive routes (Pet. 30).[13] Conceding that no express language in the Agreement compels this construction, petitioner argues nevertheless that it is a reasonable interpretation of an "ambiguous" agreement (Pet. 19). It is clear, however, that equalization agreements were entered into because the Government's policy of securing the most economical transportation would have diverted the shipments exclusively to land-grant roads, regardless of the degree of circuity and the "noncompetitive" nature of the land-grant and non-land-grant routes in so far as commercial shippers are concerned.

The history of rate concessions based upon land-grants demonstrates that the prime and only objective of such concessions was to obtain the lowest possible transportation rate for the Government. In return for the immensely valuable land-grants to railroads (estimated to total as high as 2½ billion dollars, see n. 2, p. 3, *supra*), the Government obtained rate-savings agreements. These

[13] Petitioner has apparently changed its position in this regard. In the court below, it urged that the "routes used by the defendant for this purpose are noncompetitive and impractical for the purpose of commercial traffic. Hence, plaintiff contends that it is not required under the equalization agreement to equalize rates computed via those routes." (Pl. Br. in C. Cls., p. 113.) Petitioner argues here that the routes used by the Government for computation were noncompetitive for Government traffic.

at first were not uniform; some roads were required to offer free transportation (the "free-grant lines"), others could make some charges.[14] These discrepancies proved unsatisfactory. Since "officials charged with the procurement of transportation for the Government are required to secure such transportation at the lowest available rates, the free-grant lines were used, singly or in combination with other lines, wherever such use enabled lower charges. Very circuitous routing was often employed to utilize the free grant lines."

[14] There were three types of land-grant roads: (1) Some early land-grant acts provided that Federal troops and property should be transported over the aided railroads free of charge to the Government. See Act of July 25, 1866 (14 Stat. 239). These lines were known as "free-grant lines." (2) The majority of the land-grant acts prior to 1862 provided in substance that the aided railroads should be public highways "for the use of the Federal Government, free from toll or other charge for the transportation of any property or troops of the United States." See Act of September 20, 1850 (9 Stat. 466). These railroads were known as "free-toll lines," and under a series of statutes and court decisions were entitled to receive payment for transportation of Government troops and property (18 Stat. 72, 74; 18 Stat. 452, 453; *Lake Superior & M. R. Co.* v. *United States*, 93 U. S. 442; *Atchison T. & S. F. R. Co.* v. *United States*, 12 C. Cls. 295, and 15 C. Cls. 126). (3) Other land-grant acts required the aided railroads to furnish transportation "at such charges as Congress might impose." See Act of July 27, 1866 (14 Stat. 292, 297). These lines were known as "Congressional rate-lines." The Act of July 16, 1892 (27 Stat. 174, 180) authorized the Secretary of War to fix the Government's rates over free-toll and Congressional rate railroads, but not in excess of 50 percent of those charged to the general public.

II *Public Aids to Transportation* (Fed. Coordinator of Transp., 1938), p. 42. The large volume of this transportation placed a heavy burden upon the free-grant lines, and to relieve the situation Congress by a series of acts provided that free-grant roads should receive the same compensation as the other land-grant railroads,[15] now a minimum of 50% of the commercial rate, increasing according to the percentage of non-land-grant mileage in the route. See n. 1., p. 2, *supra.*

Because Government transportation officers were required to utilize the lowest cost routes available, nongrant roads were not used, wherever possible, until they agreed to meet the low rate which the grant-roads offered;[16] equalization agreements were soon entered into by virtually all nonaided roads; and since the percentage of land-grant determined the size of the deduction, partially aided roads agreed to meet the rates of roads whose routes contained greater land-grants. See pp. 3–4, *supra.*

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[15] See, for example, Act of October 6, 1917 (40 Stat. 345, 361); Act of May 23, 1928 (45 Stat. 722); Act of February 14, 1933 (47 Stat. 800).

[16] See, for example, the instructions issued by the Quartermaster General to shipping officers: "Where * * * the carriers * * * will not equalize the lowest net rates available on certain specified traffic, such traffic should not be forwarded via the carriers shown, unless no other route is available. Where special exceptions provide that lowest net rates will not be protected via certain routes, such routes should not be used." Manual for the Quartermaster Corps (U. S. Army 1916), App. No. 9, Vol. 2, p. 223; Quartermaster General Circular No. 15, May 18, 1922.

The manifest purpose of the equalization agreements has been recognized by this Court. "In order to obtain a share of Government traffic, non-land-grant roads, have entered widely into freight-land-grant equalization agreements by which they agree to carry freight, routed over their lines at the lowest net rates lawfully available, as derived through deduction account of land grant distance * * *." *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 394, n. 1; see also 17 Comp. Dec. 978, 982; 20 Comp. Dec. 167, 169; 22 Comp. Dec. 129, 130. "By reason of these agreements, much transportation of Government troops and property is performed by equalization lines which otherwise would have to be performed by the reduced-rate land-grant lines." *Public Aids to Transportation, supra,* at p. 42. The equalizing roads were ready to accept the maximum land-grant deductions, for "the companies consider a 50% rate preferable to an almost total loss of this type of freight." Norris Kenny, *The Transportation of Government Property and Troops over Land-Grant Railroads,* 9 Journal of Land and Public Utility Economics, 368, 378.

Because of the Government's special emphasis upon economy of transportation, the likelihood that a shipment will move by a longer route to save on rates cannot be measured by the likelihood that a private commercial shipper would ever use the longer route. Comparison with commercial

shipments is idle inasmuch as the land-grant saving is available only to the Government. Historically, even the most circuitous route open to free Government traffic was found more desirable by Government transportation officers than shorter, more expensive routes. Since Government transportation will be given to those routes affording the cheapest rates (21 Comp. Dec. 744, 745), the Equalization Agreement, as the court below held, "was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route" and "to give the Government a greater range in choice of routes where considerations of economy entered into the selection" (R. 27).

Indeed, where a similar incentive exists for commercial shippers, as by a disparity in rates, circuitous shipments are by no means uncommon. It is well recognized that circuitous routing is in some circumstances favored by both carriers and shippers.[17] In *In the Matter of Coal from and to Points in Alabama*, 238 I. C. C. 82, a carrier applied to the Interstate Commerce Commission to maintain rates over routes 161.8 percent circuitous.[17] And petitioner itself has urged before the

[17] The National Industrial Traffic League recently informed the Interstate Commerce Commission that it declined "to become a party to a plan calling for minimizing the use of 'so-called circuitous route' through the establishment of mileage limitations." Traffic World (Oct. 17, 1942), p. 912.

Interstate Commerce Commission the establishment of routes for commercial shipments which, as to many of the shipments here involved, are more circuitous than the land-grant routes selected by the Government for equalization purposes.[18]

That the routes characterized by petitioner as circuitous and impractical were available to and could have been used by the Government is not in question. It was stipulated below, and the Court of Claims found (R. 44), that the "land-grant routes so selected and used for computation of rates by defendant under lawful tariffs on file with the Interstate Commerce Commission were admittedly available to the commercial public and to the Government and could have been used for the making of all of the shipments in question." Clearly a commercial shipper using such a route could not be denied the rate fixed by the tariffs to which petitioner was a party, on the ground that

[18] See *Petroleum Products to Tennessee & Mississippi*, 248 I. C. C. 21; *Cement from Leeds, Ala., to Albany, Ga.*, 245 I. C. C. 374; *Scrap Iron to Ashland, Ky.*, 253 I. C. C. 77; *Rails and Cross Ties from Steelton, Pa.*, 253 I. C. C. 428; *Petroleum Products to Montgomery, Ala.*, 253 I. C. C. 392. Permission to establish rates for the circuitous routes was sought in relief of Section 4 of the Interstate Commerce Act (49 U. S. C. § 4 (i)), which prohibits greater compensation "for a shorter than for a longer distance over the same line or route in the same direction" and "any greater compensation as a through rate than the aggregate of the intermediate rates." Obviously, at the desired rates petitioner and the other applying carriers thought they could compete *via* such circuitous routes for traffic which they otherwise could not obtain.

the route was so much more circuitous than the direct routes over petitioner's road or over the land-grant road selected by petitioner for equalization, that shippers would not normally utilize the longer route. The "routing instructions" in the tariffs on file with the Interstate Commerce Comission provided that the listed rates "apply via *all routes* made by the use of the lines of any of the carriers parties to the tariff, except as otherwise specifically provided" (R. 58–60, 71–72), and it is settled that under such a provision the circuity of the route selected is not a ground for refusal to apply the published rate. *Great Atlantic & Pacific Tea Co.* v. *Alton R. R. Co.*, 226 I. C. C. 398, affirmed 231 I. C. C. 743; *Union Underwear Co., Inc.* v. *Frankfort & Cincinnati R. R. Co.*, 214 I. C. C. 695, 697; *Wilbanks & Pierce, Inc.* v. *Atlanta and West Point R. R. Co.*, 235 I. C. C. 371, 374; cf. *Allen Manufacturing Co.* v. *Louisville & Nashville R. R. Co.*, 194 I. C. C. 209, 211.

Petitioner urges that some of the property shipped by the Government consisted of livestock, and that the routes chosen by it for equalization purposes were not practical routes ordinarily used for the shipment of livestock between those points (Pet. Br. 31, 48). But it is nowhere alleged or shown that such routes could not be used if the Government so desired. Indeed, petitioner itself was a party to an amendment to the tariff under which the route the United States used for com-

puting the net rates applicable to the shipments of livestock was expressly made available to commercial traffic at rates identical with those applicable to the more direct route used by petitioner.[19] Having agreed to open the "circuitous" route to commercial shipments at the rate applicable to the shorter route, petitioner cannot argue that the same route and rate are not here available to the Government (less land-grant deductions) (R. 56–60). Petitioner's contention that to require equalization of net rates computed *via* such land-grant routes would be unfair and unreasonable, is in effect an indirect attack on the reasonableness of the rates fixed by the filed tariffs for the "circuitous" routes—an attack which cannot be made in this proceeding. *Great Northern R. R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; *United States Navigation Co., Inc.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481–483.

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[19] Prior to the date of these shipments, there were certain restrictions upon the application of the published tariffs to the movement of livestock over the route used by the Government for equalization purposes—*via* Meridian, Miss. The tariff to which the land-grant carriers and petitioner were parties (Speiden's I. C. C. 1335, R. 58) originally prohibited the application of the livestock rates listed therein to shipments from points in Illinois to North Carolina and Virginia, *via* Mississippi, Alabama, or Georgia (R. 58–59). However, Supplement No. 5 to that tariff removed this prohibition and made the rates from Cairo to points in Virginia and North Carolina applicable to commercial shipments *via* Meridian, Miss. (R. 59).

The desirability of the route selected for equalization, as a route of actual shipment, is in a real sense immaterial as well as conjectural. The entire objective of the Equalization Agreement is to divert the shipment to the non-land-grant route; the land-grant route is selected not for actual use but merely for purposes of computing the "lowest net rates lawfully available" in order to determine the concession which the Government could lawfully have obtained had it elected to use that route, and which petitioner agreed to meet in order to induce the use of its road. Consequently, it is wholly irrelevant whether the goods would have moved over the alternative land-grant route in the absence of an equalization agreement; it is sufficient that the goods could have moved at the rates sought to be applied by the Government. Plainly nothing in the Equalization Agreement requires that computation of the applicable net rate turn upon such issues as whether the route selected has the same facilities for caring for the goods as the route used; the agreement does not differentiate between the kind of property shipped, nor does it specify that actually available routes may not be used for equalization unless commercial shippers find it convenient and practicable to use it for such goods.

The lack of merit in petitioner's contention that selection of a land-grant route for equalization purposes depends upon its practicability and the

likelihood that it would have been used for the shipment in question is shown by the "uncertainty, confusion, and constant controversy" to which, as the court below observed, such a requirement would lead (R. 46). Each movement of Government property under an equalization agreement would, under petitioner's contention, require a detailed and expert inquiry as to which of all available land-grand routes running from point of origin to destination were "practicable" for the shipment and the property in question, and hence appropriate for equalization computations.

This would entail an examination of such matters extraneous to the agreement and to published tariffs, as the nature and condition of the articles transported, the number of stops on the various land-grant routes, the facilities for caring for the property in case of need, the comparative mileage and time consumed *via* different routes between the points of origin and destination, whether the circumstances permitted more leisurely shipment or whether time was of the essence, and numerous other conjectural factors grounded upon the hypothesis that the goods have moved over a route not actually used. Since the determination of such questions could not be predicted with certainty, and might often require a protracted hearing, the only result of the re-

quirement for which petitioner contends would be to force Government shipping officers to disregard the non-land-grant carrier entirely and ship by the lowest rate land-grant route. The uncertainty thus injected into the rates payable for any equalization shipment would virtually nullify equalization agreements for all practical purposes.[20]

These considerations should preclude any attempt to "import words into the contract which would make it materially different in a vital particular from what it now is." *Gavinzel* v. *Crump*, 22 Wall. 308, 319. The objective of the agreement being to obtain as low a rate as the Government could get on any land-grant route running between the points of origin and destination, it should be construed accordingly; and if there be

[20] That the task which petitioner would impose upon Government shipping officers is burdensome may be seen from plaintiff's Exhibit No. 26 (R. 78A). That shows the numerous routes between Cairo, Ill., and the respective destinations which were available for the movement of the shipments listed in Exhibit No. 4. Under the "all routing" provision of the applicable tariffs here involved (R. 59–71), if one takes each carrier from Cairo and determines all the possible combinations of carriers forming through routes to each destination, the number of available routes is almost beyond calculation. See *Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, 190, in which it is stated that over 700 routes between Kansas City, Mo., and Chicago, Ill., were authorized by tariff; see also *Lumber from South and Southwest*, 198 I. C. C. 753, 755, in which it was testified that 4,597 open routes were available between Alexandria, La., and Chicago, Ill.

any doubt, that "doubt must be resolved in favor of the Government." *Southern Pacific Co.* v. *United States*, 307 U. S. 393, 401.[n]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

JEROME H. SIMONDS,
Attorney.

MARCH 1944.

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[n] The limitations upon circuity approved as rule of thumb by the Comptroller General in 18 Comp. Gen. 691, may be useful as a guide to voluntary administrative action. But where the transportation officer desires to invoke the full benefit of an equalization agreement, as in the case at bar, such limitations would not only be unauthorized by the agreement or any provision of law, but might frustrate the objective of the agreement by rediverting Government traffic to the circuitous land-grant routes. For, as the court below properly observed, in "the transportation of government property the competition for it is between the non-land-grant or equalization carriers" (R. 44).

APPENDIX

The relevant provisions of the Equalization Agreement of November 29, 1933, are as follows (R. 14–15):

FREIGHT LAND-GRANT EQUALIZATION AGREEMENT

The QUARTERMASTER GENERAL,
War Department, Washington, D. C.

SIR:

1. The following carriers: Southern Railway Company hereinafter called these carriers, hereby agree, subject to the conditions and exceptions stated below, to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

2. Conditions—

(a) On traffic destined to and/or received from points on lines of other carriers this agreement will only apply in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the [fol. 21] Quartermaster General, War Department, Washington, D. C., except as otherwise provided under

the heading of Exceptions in paragraph 3 below.

* * * * *

4. This agreement becomes effective December 1, 1933, and remains in effect until January 1, 1935, and thereafter from year to year unless these carriers file notice of withdrawal or change with The Quartermaster General, War Department, Washington, D. C., at least sixty days prior to the beginning of any calendar year.

5. This agreement cancels all previous equalization agreements, if any, on freight traffic filed by these carriers.

Respectfully submitted,

SOUTHERN RAILWAY COMPANY,
E. R. OLIVER, *Vice President.*

Accepted for The Quartermaster General:
By: R. E. Shannon, Capt., Q. M. C., Ass't.
Date: December 5, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 578.—October Term, 1943.

Southern Railway Company, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[April 24, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1933 petitioner, a common carrier, entered into a "Freight-Land-Grant Equalization Agreement" with the Quartermaster General, acting for the United States. This agreement was made under the authority of § 22 of the Interstate Commerce Act. 24 Stat. 387, 49 U. S. C. § 22. So far as material here, petitioner agreed

to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, *the lowest net rates lawfully available*, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement. [Italics added.]

From the point of view of the carrier the purpose of the agreement was to give it a portion of government business which might have been routed over land-grant routes.[1] Land-grant roads were under an obligation to furnish transportation to the government free of charge or at reduced rates. See Public Aids to Transportation, Federal Coordinator of Transportation (1938), Vol. II, pp. 3-42 for a review of the various Acts of Congress. At the time when this agreement was made land-grant roads were required to allow the United States 50% deductions from the com-

[1] The Court of Claims made the following finding in this case: "The purpose and effect of the freight equalization agreements of the defendant with plaintiff and with other common carriers was to equalize rates on Government property over various routes serving the same point of origin and destination, where one or more of those routes had been aided in whole or in part by grant of public lands, rates over all routes from point of origin to destination being brought down to the level of that over the route producing the lowest net rate on account of land-grant deduction. This arrangement was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route, and to give the Government a greater range in choice of routes where considerations of economy entered into the selection."

mercial rate for the transportation of property or troops of the United States.[2] 43 Stat. 477, 486, 10 U. S. C. § 1375. "Railroads which compete with the reduced-rate lines found themselves unable to participate, not only in the local transportation of Federal troops and property between the termini of the reduced-rate lines, but also in through movements from and to points beyond such termini." Public Aids to Transportation, *supra*, p. 42. Accordingly most of those roads entered into land-grant equalization agreements with the United States in order to get as large a share of the business as possible.[3] See *Southern Pacific Co.* v. *United States*, 307 U. S. 393, 394. The one involved in the present case is an example.

This suit involves 374 shipments of government property over petitioner's lines and its connections made between 1934 and 1938 while this agreement was in force.[4] There were available in case of each shipment several routes between the point of origin and the point of destination. Petitioner's route was in general the shortest. But there were other routes containing land grants of varying percentages which it was possible to use for these shipments. And the rates shown by tariffs on file with the Interstate Commerce Commission for freight shipments between the points in question were the same (with exceptions not important here) for each of the alternative routes regardless of the mileage. Petitioner computed its charges so as to allow the rate reductions to which the United States would have been entitled had it actually made the shipments by one of the available, alternative land-grant routes. The United States, however, claimed greater deductions. It showed a longer and more circuitous route which could have been used[5] and which contained more land-grant mileage than the alternative route chosen by petitioner. Since the tariff rates over either alternative route were the same, the greater land grants included in the route selected by the United States re-

[2] But see § 321 of the Transportation Act of 1940, 54 Stat. 898, 954.

[3] Petitioner's road includes 145 miles of land-grants. But as pointed out in Public Aids to Transportation, *supra*, p. 42, "The land-grant railroads are parties to these agreements for the reason that, in many instances, a non-aided portion of a land-grant railroad competes with a reduced-rate portion of another land-grant railroad."

[4] These consisted of 147 shipments of livestock by the Federal Surplus Relief Corporation from midwestern points to southeastern points; and 227 shipments of property by the Tennessee Valley Authority.

[5] Thus in case of the shipments of livestock the routes on which the United States made its computation of rates were from 137 to almost 700 miles longer than the ones actually used.

sulted in lower rates than those which were computed on the basis of the land-grant route selected by petitioner. The United States paid the lower rates. Petitioner brought suit in the Court of Claims for the difference between the amount paid and the rates computed on the basis of the tariffs for the route which it had selected. The Court of Claims denied recovery. — Ct. Cls. ——. The case is here on a petition for a writ of certiorari which we granted because of the public importance of the problem.

The Court of Claims found that the circuitous routes on which the United States based its computations could have been used for the shipments in question. But petitioner contends that such an interpretation of the word "available" is unreasonable in the present context and that it should be construed to mean "capable of being employed or made use of with advantage". In that connection, petitioner argues that it would have been improvident and uneconomical to ship livestock on such circuitous routes and that those routes would never in fact have been used by the United States. It is argued, moreover, that the equalization agreement, properly construed requires petitioner to equalize rates computed by land-grant routes which are competitive for government traffic. Its purpose, according to that contention, was to secure for petitioner traffic which in its absence would be likely to move over competing land-grant routes, as distinguished from traffic which was possible of routing over the cheapest land-grant route.

We agree, however, with the Court of Claims. In this context the "lowest net rates lawfully available" mean to us the lowest net rates which could have been obtained on the basis of tariffs on file with the Interstate Commerce Commission. Whether such circuitous routes as were employed in the present computation would have been actually used for these shipments in absence of the equalization agreement is of course unknown. But circuitous routing by the United States in order to obtain the benefits of its earlier land-grants to railroads was apparently a common practice. See Public Aids to Transportation, *supra*, p. 42. The records show that the privilege of obtaining the benefit of rates on land-grant routes is a valuable privilege indeed.[6] We cannot assume that the United States intended to surrender any of those benefits by granting the equalizing carriers more favorable rates than those to which it was lawfully entitled on the land-grant

[6] See Public Aids to Transportation, *supra*, pp. 43-45 Kenny, Land-Grant Railroads and the Government (1933), 9 Journal of Land & Public Utility Economics 368.

routes, unless the purpose to do so was plainly expressed. It must be remembered that the equalization agreement was a rate-making agreement. Its object was to divert shipments to the non-land-grant route. The land-grant route was chosen merely for the purpose of computing the rate. The fact that in a given case the shipment probably would not have moved over the land-grant route is immaterial. The United States was bargaining for low rates for the shipment of its property. It did not differentiate between the types of property shipped. It did not in terms state that land-grant routes, though actually available, would not be used in computing the rate unless they would in fact have been convenient or practicable to use for the particular shipment. The standard it prescribes is "the lowest net rates lawfully available." We may not resolve any ambiguities which may linger in that phrase against the United States. Cf. *Southern Pacific Co.* v. *United States, supra,* p. 401. We are not warranted in assuming that the United States was more generous to this carrier than the language of the contract requires. We must assume that the contracting officers for the United States drove as provident a bargain as a reading of the agreement fairly permits.

At times the United States has made equalization agreements which were more favorable to the equalizing carriers than the instant one appears to be. Thus in 1917 a passenger land-grant equalization agreement was made with petitioner and other carriers[7] whereby they agreed to accept the lowest net fare "lawfully available, as derived, through deductions account land-grant distance *via a usually traveled route for military traffic,* from a lawful fare filed with the Interstate Commerce Commission as applying from point of origin to destination via such route at time of movement." (Italics added.) That agreement suggests that when the United States desired to give equalizing carriers more favorable rates than the lowest rates to which it was lawfully entitled on land-grant routes, it chose apt words to express its purpose. It also gives added significance to the omission of any such qualification in the present agreement. It suggests that if we read into the agreement the qualification which the petitioner desires, we would remake the contract.

Much material bearing on administrative construction of various types of equalization agreements has been pressed upon us. But we have not relied on it as we found it inconclusive.

Affirmed.

[7] See Manual for the Quartermaster Corps, 1916 (1917), vol. 2, pp. 223, 230.